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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 747

ODOM FARRELL SULLIVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 101–106) is not yet officially reported. The District Court's findings of fact and its order denying petitioner's motion to be allowed to withdraw his plea of *nolo contendere* (R. 89–93) are not reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 9, 1954 (R. 106–107). The petition for a writ of certiorari was filed May 6, 1954. The jurisdiction of this Court is invoked

under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the indictments, though properly returned by a duly constituted grand jury, were subject to dismissal because presentation of the cases had not been specifically authorized by the Attorney General.

2. Whether the District Court erred in refusing to grant petitioner's motion to set aside the judgment of conviction and to permit him to withdraw his plea of *nolo contendere*.

STATUTES, EXECUTIVE ORDERS, AND RULES INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years,

or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

SEC. 3740. AUTHORIZATION TO COMMENCE SUIT.

No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced.

(26 U. S. C. 1946 ed., Sec. 3740.)

Executive Order No. 6166, promulgated June 10, 1933 (5 U. S. C. 1946 ed., Secs. 124–132):

SEC. 5. The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

For the exercise of such of his functions as are not transferred to the Department of Justice by the foregoing two paragraphs, the Solicitor of the Treasury is transferred from the Department of Justice to the Treasury Department.

Nothing in this section shall be construed to affect the function of an agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

Federal Rules of Criminal Procedure:

RULE 32. SENTENCE AND JUDGMENT:

* * * * *

(d) *Withdrawal of Plea of Guilty.*—A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

STATEMENT

On January 31, 1952, a letter (R. 25–26) was written by a Department of Justice official, acting for the Attorney General, to Mr. Lewellyn Luce, counsel for petitioner, advising that the case of O. F. Sullivan had been received in the Justice Department with the recommendation that criminal proceedings be instituted for income tax evasion for the years 1946, 1947, and 1948. Mr.

Luce had previously written requesting a conference in the event the case was transmitted from the Bureau of Internal Revenue to the Justice Department. The letter of January 31 acknowledged this request and stated that a conference date would be proposed after March 15.

While the case was being considered by the Justice Department, a duly constituted grand jury for the District of Kansas returned two indictments against petitioner on February 28, 1952. (R. 1–4.) The first count in indictment No. 8751 charged that petitioner wilfully attempted to defeat and evade a large part of his individual income tax for the calendar year 1945 by filing a false and fradulent income tax return. (R. 1.) Counts two, three and four charged like offenses for the years 1946, 1947 and 1948. (R. 2–3.) Count one in No. 8752 charged that petitioner was the president of Central Theater Company, Inc., a corporation, and that he wilfully attempted to defeat and evade a large part of the income taxes due and owing by the corporation for the calendar year 1945 by filing a false and fraudulent tax return, wherein he understated the net income of the corporation for the year 1945 and the amount of income tax due thereon. (R. 3–4.) Count two charged a like offense involving the year 1946. (R. 4.) On September 8, 1952, petitioner entered a plea of not guilty to the six counts of the two indictments. (R. 4.)

On January 12, 1953, petitioner filed motions to dismiss the indictments on the grounds that evidence concerning the violations was not presented to the grand jury pursuant to the direction of the Attorney General. (R. 23–24.) The Government presented an affidavit (R. 24–25) by Charles S. Lyon, Assistant Attorney General, Tax Division, Department of Justice, dated January 19, 1953, wherein it was stated that a conference in the Justice Department is granted as a matter of grace, not as a matter of right, that no statute requires that cases be referred to the Justice Department in Washington prior to institution of criminal proceedings, and that in some instances cases are referred directly to the United States Attorney without prior review in the Tax Division, Department of Justice. The court denied the motions to dismiss. (R. 91.) The cases were consolidated and set for trial April 6, 1953, at which time a jury was empaneled. (R. 26, 91.)

On April 8, 1953, petitioner appeared with counsel, moved to withdraw the pleas of not guilty as to counts one and three of No. 8751 and count one of No. 8752, and tendered pleas of *nolo contendere* to these counts. (R. 26.) United States Attorney Davis advised the court that he did not oppose such pleas and stated that he had authority from the Justice Department in Washington to make no objection. (R. 26.) The court accepted the pleas. (R. 26–27.)

On motion of the Government, the remaining counts were dismissed. (R. 27.)

When petitioner appeared for imposition of sentence on May 26, 1953, counsel for the Government stated the facts of the case. (R. 28–34.) Following this, counsel for petitioner made a statement in an effort to mitigate the effect of Government counsel's remarks, and strongly urged probation. (R. 34–39.) Following these statements and a brief remark by petitioner himself (R. 40), the court imposed a sentence of three years' imprisonment and a fine of $13,000. (R. 40.)

On May 29, 1953, petitioner filed a motion in arrest of judgment (R. 43) based on the same grounds as the motion to dismiss, and a motion to set aside the judgment of conviction and to permit him to withdraw his plea of *nolo contendere*. (R. 43–44.) On June 12, 1953, an amended motion to permit the withdrawal of the plea and a petition for probation were filed. (R. 44–57.) On June 23 and 25, 1953, hearings on the above motion were had at which time three attorneys representing petitioner filed affidavits in support of the motions. (R. 57–68.)

In substance, the affidavits recounted statements allegedly made by the United States Attorney and his assistant at meetings on April 5, 6 and 7, which statements were alleged to be solely responsible for the entrance of the plea of *nolo*

contendere. The affidavits charge that when the United States Attorney was asked what his recommendations would be regarding sentence, he answered that it was not the court's practice to request his opinion, but that he would have no objection to probation or a suspended sentence. (R. 58, 60–61, 65.) Mr. Harley, in his affidavit, however, stated that Mr. Luce and Mr. Jochems informed him that they were unable to obtain a definite commitment from Mr. Davis that he would recommend probation or a suspended sentence. (R. 62.) In answering affidavits (R. 68–75), the United States Attorney and his assistant denied that they had ever expressed the view that the court would be lenient or would grant probation (R. 70, 73), and stated that they had carefully avoided any commitments (R. 71, 75.) The United States Attorney stated that the suggestion of a *nolo contendere* plea had come originally from defense counsel. (R. 69.) The District Court found as a fact that no commitments had been made by the prosecution and denied the motions. (R. 92–93.)

The Court of Appeals affirmed the conviction. (R. 101–107.)

ARGUMENT

1. Petitioner contends (Pet. 10–12) that the indictments returned by a duly constituted grand jury in the District of Kansas are void because the United States Attorney presented certain facts

and evidence to the grand jury without receiving specific direction from the Attorney General to do so. This, petitioner urges, was not in compliance with Section 3740 of the Internal Revenue Code, Executive Order 6166 (*supra,* pp. 3–4), or Circular Letter 2431, dated August 10, 1933. (R. 105.)

Petitioner does not question the propriety of the organization, composition, proceedings or deliberations of the grand jury. He relied entirely in support of his motion to dismiss on the fact that the United States Attorney had not been specifically directed by the Attorney General on February 28, 1952, or previously, to present the criminal aspects of the case to the grand jury. No claim was made that the Constitution or any statute prohibited the grand jury from taking the action they did. Unless the grand jury's power was restricted by the Executive Order, Circular Letter, or Section 3740, the indictments were entirely legal and sufficient. It is undisputed that a Federal grand jury has plenary power to investigate in all criminal matters within the jurisdiction and render indictments either at the instance of the court, the United States Attorney, the Attorney General, or on its own initiative from evidence it may gather or from knowledge of its members. See *Hale* v. *Henkel,* 201 U. S. 43, 63–66; *United States* v. *Thompson,* 251 U. S. 408, 413–414; *In re Miller,*

17 Fed. Cas. No. 9552; *Blair* v. *United States,* 250 U. S. 273; *United States* v. *Philadelphia & R. Ry. Co.,* 225 Fed. 301 (E. D. Pa.); *Frisbie* v. *United States,* 157 U. S. 160, 163. See *Re Charge, Chase,* 30 Fed. Cas. No. 18,248:

> You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. * * *
>
> In respect to the mode and extent of your inquiries, your own good sense will be your best guide.

Section 3740 of the Internal Revenue Code, on which petitioner relies, relates only to civil proceedings. In *United States* v. *Hess,* 127 F. 2d 233, 238 (C. A. 3d), the court said: "This provision [Sec. 3740] is a part of the Internal Revenue Code and relates only to those *qui tam* actions brought under the revenue laws."

Petitioner's view of Section 5 of Executive Order 6166 apparently is that no grand jury could return an indictment for the violation of internal revenue laws without the approval of the Justice Department and without receiving specific authorization therefrom. An examination of that order clearly indicates that it simply had the effect of transferring the handling of

all claims and demands by, and offenses against, the United States to the Department of Justice from all other agencies. Nothing in the order indicates that the power of a grand jury to indict is in any way limited nor are any restrictions placed on the right of the United States Attorney to present evidence.[1]

In view of the clear import of the Executive Order, any restriction upon the initiative of the United States Attorneys, as claimed by petitioner, derived from Circular Letter 2431. A circular letter is not an official regulation and does not have the force and effect of law. The Attorney General might have directed the United States Attorney to seek dismissal of the indictments upon learning of them, but he chose not to do so. There is language in the letter authorizing the United States Attorney to present a case to the grand jury when "an emergency call[s] for immediate action." Petitioner made no showing that such emergency did not exist here, and it may be assumed that the Attorney General was satisfied with the action of his subordinate, since he took no steps to have the indictment set aside. Furthermore, the circular letter was merely intended to control the internal functioning of the Department of Justice and was obviously not intended to confer rights upon defendants.

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[1] The United States Attorney is an integral part of the Justice Department. See *United States* v. *One 1941 Cadillac Sedan*, 145 F. 2d 296, 299 (C. A. 7th).

2. Petitioner contends (Pet. 12–15) that the trial court erred in refusing to allow him to withdraw his plea of *nolo contendere* and in denying the motion to set aside the judgment of conviction. The request for relief was made under Rule 32 (d) of the Federal Rules of Criminal Procedure (*supra*, p. 4). Under this rule, it will be noted, no motion to withdraw a plea of *nolo contendere* may be made after sentence is imposed, except that the court may grant such a motion to correct a "manifest injustice." Petitioner, therefore, was required to demonstrate manifest injustice since, in this case, imposition of sentence preceded the motion to withdraw the plea. (R. 40, 43–44.)

In support of his motion that the court allow the plea to be withdrawn to avoid manifest injustice, petitioner claimed that the United States Attorney and his assistant made statements to petitioner's lawyers which led them to believe that petitioner would be placed on probation or given a suspended sentence if he were to plead *nolo contendere*. (R. 43–50.) It should be noted that petitioner apparently does not claim that the United States Attorney promised even to recommend such leniency. Rather, this specific claim is that the United States Attorney promised petitioner's lawyers that he would not oppose probation or a suspended sentence. (Pet. 12, 19.) However, the district court found "that no

promise of probation or lenience was made, either to the defendant personally or to his counsel by the United States Attorney or his assistant who handled the prosecution for the Government." (R. 92–93.) The Court of Appeals, after holding that his finding was supported by the evidence, further concluded as follows (R. 106):

> Even if it be assumed that the United States Attorney promised that he would not oppose an application for probation, there is nothing in this record to indicate that he did actively oppose probation. He was under a duty to present the relevant facts with respect to the offenses charged to the court. Those facts may have indicated that probation was not appropriate, but that cannot in any sense be construed to be a violation of his alleged promise not to oppose probation.

Petitioner relies on several cases,[2] none of which is applicable here. The courts have held

[2] *Bergen* v. *United States*, 145 F. 2d 181, 187 (C. A. 8th), and *Von Moltke* v. *Gillies*, 332 U. S. 708, are not in point since in those cases defendants were not represented by counsel and were not familiar with the nature and extent of the charges against them, circumstances not present in this case where petitioner was adequately represented. *Kercheval* v. *United States*, 274 U. S. 220, is not in point since there the Court had allowed the defendant to withdraw his plea and

without exception that no basis exists for setting aside a plea of *nolo contendere* simply because the defendant was surprised at the severity of the sentence. *Williams* v. *United States,* 192 F. 2d 39 (C. A. 5th); *Ridgeway* v. *United States,* 205 F. 2d 680 (C. A. 6th); *United States* v. *Shneer,* 194 F. 2d 598 (C. A. 3d).

At the hearing before sentence (R. 27–40), petitioner had an opportunity to reply to the Government's explanation of the case and did so reply. There was still time under Rule 32 (d) for petitioner to seek to withdraw the *nolo contendere* plea, as sentence had not yet been imposed. It would appear that petitioner did not then consider that the United States Attorney's statement was so unfair as to require him to withdraw his plea. Instead, he took his chances on clemency. Under the circumstances, the Court of Appeals correctly concluded that the trial court was within its discretion in refusing to grant the belated motion for leave to withdraw the plea.

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the only question was the right of the prosecution to use the plea as evidence in the trial that followed. In *United States* v. *Lias,* 173 F. 2d 685 (C. A. 4th), the plea was permitted to be withdrawn because defendant was misled by statements made by the court leading him to believe he would be placed on probation. In the instant case the trial judge specifically found that no such statements were made. (R. 92.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1954.